

In the Supreme Court of the Hawaiian Islands, In Banco.

SPECIAL TERM, JUNE, 1890.

JUDD, C. J., M'CUALLY J., BICKERTON, J., DOLE, J.

IN THE MATTER OF THE APPLICATION OF THE MINISTER OF THE INTERIOR FOR A WRIT OF MANDAMUS, VS. GEORGE J. ROSS, THE AUDITOR-GENERAL.

Vouchers for the support, maintenance and guarding of prisoners while employed on the Volcano road were presented by the Minister of the Interior to the Auditor-General for approval; the appropriation for that road was exhausted at the time said work was performed and said bills incurred. The vouchers were drawn upon the appropriation for support of prisoners; Held, the Auditor-General should have audited and approved them.

OPINION OF THE COURT BY DOLE, J., MR. JUSTICE M'CUALLY, DISSSENTING.

The petition was for a writ of mandamus to compel the respondent to audit certain accounts or show cause for not doing so. The respondent appeared and showed cause before Mr. Justice McCully who dismissed the proceedings, from whose decision the complainant appealed to this court. Afterwards the parties filed the following stipulation:

"It is hereby agreed between the parties to the above matter that all technical points which may arise in the case, may be waived, and the judgment of this honorable court rendered upon the point as to whether or not the Auditor-General should audit bills incurred for the support, maintenance and guarding of prisoners employed upon the Volcano road, the appropriation for that road having been exhausted at the time said work was performed and said bills incurred, said bills being charged to the appropriation for support of prisoners."

This stipulation radically simplifies the case and enables the court to consider the law involved, without going into the important question of the legal discretion of the Auditor-General, which was before the court below.

The respondent contends, and the decision appealed from holds, substantially, that the Legislature having appropriated a definite sum of money for the Volcano road, which had been exhausted, the performance of prison labor on the same work was a transfer of the appropriation for the Support of Prisoners and was consequently illegal; also, that the performance of work on the Volcano road in addition to work and materials paid for by the appropriation thereof, was defeating the intention of the Legislature, which countenanced only, for that particular work, such labor and materials as their appropriation might pay for.

It is clear to us that the performance of prison labor on the Volcano road under the circumstances, was not a transfer from the appropriation for support of prisoners, for the following reasons: A transfer is an expenditure of money belonging to one appropriation on account of another appropriation, so that the appropriation to which such money is entitled fails to get the benefit of it as for instance, the expenditure of the appropriation for the extension of Queen street on Kinan street. The law requires that "prisoners sentenced to imprisonment at hard labor shall be constantly employed for the public benefit on the public works, or otherwise, as the Marshal, with the approval of the Minister of the Interior, may think best." (Civil Code, Sec. 215). The Volcano road, being a "public work," the Minister of the Interior was fully authorized to approve of the employment of prisoners thereon; while so employed, as in any other locality or on any other "public work," it was necessary that such prisoners should be furnished with food and shelter and have the necessary guards and overseers, the expenses whereof are properly chargeable to the appropriation for the support of prisoners, as has heretofore been the custom. The performance of prison labor upon a "public work" for which there is an independent appropriation, cannot be termed a transfer of an appropriation, for the appropriation for the support of prisoners is thereby expended according to law, and if the object of a distinct appropriation, which is a public work, receives the benefit of such labor; that is also according to law and does not defeat the intention of the Legislature as to such other appropriation, such intention being limited solely to the expenditure of a definite sum of money out of the Treasury on account of such object. The Legislature in its Appropriation Bill deals with money rather than with services and material. It would undoubtedly be well for it to require that not only prison labor, but also all special services furnished by government employees to any enterprise supported by a legislative appropriation should be charged against such appropriation; as for instance, that the services of a government surveyor in laying or grading a public road should be charged against the appropriation for the road. At present there is no law that requires the Minister of the Interior to have the prison labor in question charged against the Volcano Road appropriation.

In brief, the payment of the bills in question should have been authorized by the Auditor-General, because the law requires it and necessity demands it. The law requires that when prisoners can be "well employed in the performance of any public work," they shall constantly be so employed; and necessity demands that these men, deprived of

their opportunities of self-support by the authority of the State, shall be supported by the State; they cannot be left to starve, neither can such dealers as may furnish them with food and other necessities during such confinement, be denied their reasonable charges therefor. The contrary view would tend to embarrass, if not defeat the execution of the law for applying the labor of prisoners to public works, and in some cases at least, as in the case in point, to cast an unnecessary slur upon the government in its prison management; for carried to its logical sequence, such a view would insist either that the prison laborers in question should have gone without food and other necessities during the month they were occupied on the Volcano Road, or that the dealers who furnished them must now lose the value of the materials furnished.

We are, therefore, of the opinion that the Auditor-General should authorize the payment of the bills in question.

Attorney-General Peterson for petitioner; F. H. Hatch for respondent.

Honolulu, July 3, 1890.

CONCURRING OPINION BICKERTON, J.

This case as it appears here by the stipulation is shorn of the most important questions that were argued and passed upon by Mr. Justice McCully, viz.: the judgment and discretion of the Auditor-General to determine whether a bill was drawn upon a fund which was applicable to it, and further, as to abuse of this discretion. There does not seem to be any appeal on these points which were decided in favor of the Auditor-General in the court below, but by the stipulation they are not now before us, and we are limited to the one question, which in my opinion assumes the shape of a question submitted by agreement of the Minister of the Interior and the Auditor-General to the Supreme Court for their opinion; the question as to whether a writ of mandamus should issue seems to have been abandoned.

The law as it now stands, undoubtedly gives the Minister of the Interior full authority to use prison labor on any public work; there is no law which requires that such labor shall be charged to the appropriation for such public work. It had been the custom for a long time to do so, until the late Administration abolished the custom or rule, thereby placing at the disposal of the Minister of the Interior the whole appropriation of \$80,000 and the contingent one of \$15,000 for the support of prisoners, which he could use in the shape of labor to supplement any appropriation for any public work. A work for which an appropriation of say \$10,000 was made, could be made to appear to cost only \$9,000, leaving a balance of \$1,000 unexpended, when in fact it had cost \$19,000 by the use of prison labor which had cost the country \$10,000. As the law now stands the Minister might have put all the prison labor in the Kingdom on the Volcano road and no one could prevent it until he would be called to account for his doings by the Legislature. Wherever these prisoners may be they have to be fed and guarded and the bills paid, notwithstanding the fact that they may be working on a public work for which the appropriation is exhausted.

After looking at the question from all points of view, the fact still remains that the Minister had the authority of law to employ these prisoners on the Volcano road, and the bills for their support and guards had to be paid from the only appropriation available, viz.: support of prisoners. If the Minister misused or abused his authority, it was a matter between him and the Legislature.

There certainly is some legislation required on this matter, for although this is not actually taking so many dollars from one appropriation and devoting it to other work for which there was an appropriation that is exhausted, the result is the same, the work is costing more than was contemplated or intended by the Legislature.

I feel compelled as the law now stands to concur in the conclusion arrived at in the above opinion.

July 3, 1890.

DISSSENTING OPINION OF M'CUALLY, J.

This case purports to be an appeal of the matter which came before me in March last, but now under the following stipulation:

"It is hereby agreed between the parties to the above matter that all technical points which may arise in the case may be waived and the judgment of this honorable court, rendered upon the point as to whether or not the Auditor-General should audit bills incurred for the support, maintenance and guarding of prisoners employed upon the Volcano Road, the appropriation for that road having been exhausted at the time said work was performed and said bills incurred, said bills being charged to the appropriation for support of prisoners."

I am at a loss to understand the legal status of the present case. Counsel say that no writ of mandamus is now asked. I, therefore, respectfully submit that this is not an appeal of the case formerly heard, and that the law as decided before stands as the law of the case, namely, that the authority of the Auditor-General to audit—that is to examine and approve or refuse to approve of bills—is an authority to exercise his judgment or discretion therein, and that hence he cannot be compelled by writ or mandamus to make a certain decision unless it shall appear that he has abused his discretion.

The Court now not being called to hear an appealed mandamus case, what legal form known to our law is presented. It is clearly not the submission by parties of a question in difference of a civil action in the Supreme Court, upon an affidavit that the controversy is real, and upon which final judgment may be rendered and enforced (C. L. p. 330). It is not one of the three cases provided by Art. 70 of the Constitution: the King, his Cabinet and the Legislature shall have authority to require the opinions of the Justices of the Supreme Court upon important questions of law, for it is the request of the Minister of the Interior and the Auditor-General.

It is stipulated that all technical points may be waived. A technical point might be the substitution of the newly appointed Minister of the Interior in place of the Minister who brought this petition, but I do not understand the above points to be technical, but of the essence of the matter, so that being waived, nothing is left. As, however, argument has been made before us without considering the objections which appear to me to lie against the mode of proceeding, I wish to say that upon a reconsideration of the question whether the Auditor-General should have audited the bills which he refused to approve, and whether such refusal was an abuse of his discretion, I am of the opinion I formerly expressed.

It was a crucial question put to the Attorney-General, during the argument, whether, if the Minister of the Interior had expended the \$30,000 appropriated for the Volcano Road, in a contract for building fifteen miles of it, he would be authorized to build the remaining fifteen with prison labor supported out of the \$80,000 appropriated for support of prisoners. The Attorney-General gave the answer which the logic of his position required, that the Minister would be authorized thereto. It results from this that no "specific appropriation" is specific in amount, for it may be increased by as much more out of \$80,000, or other amount appropriated for prisoners' support as the Minister may please to add to it.

It was claimed in argument that the drafts on the prisoners' fund were not expenditures on the road, but for their support. Now, if the Auditor approved the bills, the prisoners would be employed on the road, if he disallowed them, the prisoners would not be worked there. So it is only a difference of form of words how the prisoners' support fund is applied to building the road. It seems to me the actual use of this fund for building the road cannot be cured by styling it a draft for the support of the prisoners. In order to proceed with an appearance of legality the Minister has been compelled to drop the system of credits for realizations for prison labor, because the realizations would be payments out of the appropriation for this road. When this was exhausted there were no longer realizations from prison labor. In a proper business transaction the cost of the prisoners would be drawn from the fund for maintaining them, at the same time that a like or suitable amount is charged for their labor against the appropriation for the work on which they were employed.

And I do not find a justification for this indefinite addition to the special sum allowed for this road in the general statute provision which directs the hard labor to which prisoners are sentenced to be applied to public works. It was not necessary to couple with it that it should be counted as a Government resource and realization, and accounted for as a cash or credit to some account.

The provision in Sec. 216, that prisoners may be let out to labor for private individuals does not express a requirement that the proceeds shall not be rendered as a credit, but can any one doubt that it ought to be done?

For these reasons I think the Auditor-General did not abuse his discretion in refusing to approve the bills in question.

LAWRENCE M'CUALLY.

July 3, 1890.

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